Alandu a/l Santhanasamy v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–334–12 OF 2011
ABU SAMAH, ROHANA YUSUF AND HAMID SULTAN JJCA
29 NOVEMBER 2013

B

Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused convicted for murder and sentenced to death — Appeal against decision of High Court — Defences of intoxication and private defence — Whether defences created reasonable doubt against prosecution's case — Whether prosecution successful in establishing prima facie case — Penal Code ss 85(2)(b), 86(2) & 102

C

D

The appellant had visited the victim's house and both got drunk. The appellant and the victim had a quarrel and subsequently a fight ensued and got serious when the appellant took out a gun and hit it on the victim's head. The victim fell on the floor, unconscious, but the appellant continued with the assault. The main witness for the prosecution, the victim's wife ('SP6') was in the house and the appellant instructed SP6 to stab the victim with a knife. When SP6 refused, the appellant stabbed the victim twice in the neck, causing the victim's death. The appellant had threatened and intimidated SP6 not to tell anyone what really happened and told her to concoct a story which he masterminded. However, SP6 revealed the appellant's name and the latter was arrested and charged in the High Court. The appellant relied on the defence of intoxication under ss 85(2)(b) or 86(2) of the Penal Code ('Code'); and the defence of private defence under s 102 of the Code. Both defences were rejected and the trial judge found that SP6 was a witness of truth as her version corroborated with the medical evidence given by SP6. The appellant was convicted for murder and sentenced to death. Hence, the present appeal.

E

F

G

Held, dismissing the appeal:

(1) The fact that the appellant relied on the two defences in law affirmed the actus reus of the offence. The nature of injury would clearly attract s 300 of the Code, unless one or both defence succeeded to escape sentence pursuant to s 302 of the Code (see para 9).

H

(2) Section 86 of the Code would only become applicable by reason of intoxication caused against the appellant's will. Even in a case of involuntary drunkenness, the appellant had to show that by reason of drunkenness he did not know the nature of the act; or that it was wrong, or that it was contrary to law. Section 85 of the Code protection would also not be available on the plea that the friends or relatives persuaded

I

him to drink more than he could digest. There was insufficient evidence to sustain the defence of intoxication (see para 11).

(3) The threshold requirement to satisfy the defence of self defence would be very high. The evidence in the instant case shows that the appellant had entered the premise of the victim and had a quarrel which led to fatal injury which caused the death of the victim. On such facts, it must be at least shown that the victim was the assailant and there was no opportunity for the appellant to escape and/or if any attempt to escape would have been futile. It would have been different if the victim had entered the appellant's premise with arms and subsequently there was a quarrel and assault and in the moment of heat, injuries were caused which led to death and the conduct was not punitive in nature. In such circumstances, the appellant need not show that he could have escaped from his own house. The facts of the case would show that it was the appellant who entered the victim's house and not otherwise (see paras 10–11).

(4) The nature of injury would also not assist the appellant to rely on s 102 of the Code. The right of private defence was available for protection against unlawful aggression and not for punishing the aggressor for the offence committed by him. Section 102 of the Code was said to be preventive and not punitive right (see para 15).

[Bahasa Malaysia summary

Perayu telah mengunjungi rumah mangsa dan kedua-duanya mabuk. Perayu dan mangsa bertengkar dan kemudiannya pergaduhan tercetus dan menjadi serius apabila perayu mengeluarkan pistol dan memukulnya di kepala mangsa. Mangsa jatuh di atas lantai, tidak sedarkan diri, tetapi perayu meneruskan serangan. Saksi utama pihak pendakwaan, isteri mangsa ('SP6') berada di dalam rumah itu dan perayu mengarahkan SP6 untuk menikam mangsa dengan pisau. Apabila SP6 menolak, perayu menikam mangsa dua kali di leher, menyebabkan kematian mangsa. Perayu telah mengancam dan menakut-nakutkan SP6 agar tidak memberitahu sesiapa apa yang sebenarnya berlaku dan memberitahunya untuk mereka-reka cerita yang didalanginya. Walau bagaimanapun, SP6 mendedahkan nama perayu dan perayu ditahan dan didakwa di Mahkamah Tinggi. Perayu bergantung kepada pembelaan mabuk di bawah ss 85(2)(b) atau 86(2) Kanun Keseksaan ('Kanun'); dan pembelaan pertahanan persendirian di bawah s 102 Kanun. Kedua-dua pembelaan ditolak dan hakim perbicaraan mendapati bahawa SP6 adalah saksi benar kerana versinya disokong dengan bukti perubatan yang diberikan oleh SP6. Perayu telah disabitkan dengan pembunuhan dan dihukum mati. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan itu:

(1) Fakta bahawa perayu bergantung kepada kedua-dua pembelaan dalam

undang-undang mengesahkan actus reus kesalahan itu. Jenis kecederaan jelas akan menarik perhatian s 300 Kanun, melainkan satu atau kedua-dua pembelaan berjaya melepaskan hukuman menurut s 302 Kanun (lihat perenggan 9).

(2) Seksyen 86 Kanun hanya akan menjadi terpakai dengan sebab mabuk yang disebabkan tanpa kerelaan perayu. Malah dalam kes mabuk tanpa kerelaan, perayu terpaksa menunjukkan bahawa oleh sebab mabuk dia tidak mengetahui keadaan itu; atau bahawa ia adalah salah, atau bahawa ia adalah bertentangan dengan undang-undang. Seksyen 85 Kanun perlindungan itu juga tidak terdapat pada pengakuan bahawa rakan-rakan atau saudara-mara memujuknya untuk minum lebih daripada yang boleh dicerna. Tiada bukti yang cukup untuk mengekalkan pembelaan mabuk (lihat perenggan 11).

(3) Keperluan untuk memenuhi pembelaan pertahanan diri akan menjadi sangat tinggi. Bukti dalam kes ini menunjukkan bahawa perayu telah memasuki premis mangsa dan bertengkar yang membawa kepada kecederaan maut yang menyebabkan kematian mangsa. Pada fakta-fakta itu, ia mesti sekurang-kurangnya menunjukkan bahawa mangsa adalah penyerang dan tidak ada peluang untuk perayu untuk melarikan diri dan/atau jika sebarang percubaan untuk melarikan diri akan menjadi sia-sia. Ia akan menjadi berbeza jika mangsa telah memasuki premis perayu dengan bersenjata dan kemudiannya bertengkar dan serangan dan pada saat genting, menyebabkan kecederaan yang membawa kepada kematian dan kelakuan yang tidak bersifat punitif. Dalam keadaan sedemikian, perayu tidak perlu menunjukkan bahawa dia boleh melarikan diri dari rumahnya. Fakta kes itu akan menunjukkan bahawa ia adalah perayu yang memasuki rumah mangsa dan bukan sebaliknya (lihat perenggan 10–11).

(4) Jenis kecederaan juga tidak membantu perayu bergantung kepada s 102 Kanun. Hak pertahanan persendirian yang sedia ada adalah untuk perlindungan terhadap pencerobohan menyalahi undang-undang dan bukan untuk menghukum penyerang bagi kesalahan itu dilakukan olehnya. Seksyen 102 Kanun dikatakan adalah untuk hak mencegah bukannya punitif (lihat perenggan 15).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 216–222.

Cases referred to

Balamurugan Nagaraju v PP [2013] MLJU 275; [2013] 5 CLJ 308, CA (refd)
Chan Kwee Fong v PP [2010] 1 MLJ 441; [2010] 3 CLJ 671, CA (refd)
Chin Kek Shen v PP [2013] 5 MLJ 827, CA (refd)

Director of Public Prosecutions v Beard [1920] AC 479, HL (refd)
Macheria Balaswamy of Guntur, In re AIR 1953 Mad 827 (refd)
Mohamad Radhi bi Yaakob v PP [1991] 3 MLJ 169, SC (folld)
Jethuram Sukhra Nagabanshi v State of Madhya Pradeh AIR 1960 MP 242, HC (refd)
Kenneth Fook Mun Lee v PP [2007] 2 MLJ 130; [2006] 4 CLJ 359, FC (refd)
Pramod Mandal v State of Bihar [2004] 4 LRI 24, SC (refd)
PP v Thenegaran a/l Murugan [2013] 3 MLJ 328, CA (refd)
Rozmi bin Yusof v PP [2013] 5 MLJ 66, CA (refd)
Tong Kam Yew & Anor v PP [2013] 4 MLJ 888, CA (refd)

Legislation referred to

Penal Code ss 80, 85(2), (2)(b), 86(2), 102, 300, 302

Appeal from: Suit No 45B–01 of 2009 (High Court, Taiping)

Karpal Singh (Zaleha Al-Hayat with him) (Karpal Singh & Co) for the appellant.
Tengku Intan Suraya bt Tengku Ismail (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant's appeal in respect of conviction and sentence of death for charge of murder came up for hearing on 11 September 2013 and on the same day we heard and dismissed the appeal. This is our judgment.

[2] The learned counsel for the appellant has filed a written submission and relied on a number of cases to support the contention.

[3] It is well settled that it is in the hands of the trier of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction. In so doing if the court orders an acquittal or conviction it cannot be set aside by the appellate court unless it records a finding that the view taken by the trial court was not a possible reasonable view of the evidence on record (see *Pramod Mandal v State of Bihar* [2004] 4 LRI 24; *Public Prosecutor v Thenegaran a/l Murugan* [2013] 3 MLJ 328).

[4] The issues raised in this case are related to whether the learned trial judge has justly and fairly considered the defence case and whether the conviction is safe.

BRIEF FACTS

[5] The appellant had visited the victim's house, and both got drunk, had a

quarrel and subsequently had a fight. The victim brought his gun from one of his rooms and fired shots towards the door and sat on a chair. The quarrel continued and the appellant pretended to leave the house and turned back and took the gun and hit on the victim's head. The victim fell on the floor in an unconscious state but the appellant continued with the assault. SP6 the victim's wife was in the house and was the main witness for the prosecution who had witnessed the incident. The appellant instructed SP6 to stab the victim with a knife and when she refused the appellant stabbed the victim twice in the neck, causing the victim's death. The appellant had threatened and intimidated SP6 not to tell anyone of what really happened and told her to concoct a story which he masterminded and left the house. In consequence of the threat she executed the concocted story and did not immediately inform the police of the real assailant, but subsequently revealed the name of the appellant who was arrested and charged. The court had taken note of different version because of the concocted story and accepted her evidence and explanation at the prosecution stage and called for the defence.

[6] At the High Court the appellant had relied on the defence of (i) intoxication under s 85(2)(b) or 86(2) of the Penal Code; (ii) defence of private defence under s 102 of the Penal Code. Both the defences were rejected and the learned trial judge found that SP6 was a witness of truth and her version was corroborated by medical evidence given by SP8. It must be noted that the defence technically is an admission of the actus reus of the offence and the nature of injury will attract s 300 of the Penal Code, fortifying the position of the prosecution at the prosecution stage.

[7] The appellant had filed a lengthy petition of appeal essentially relating to finding of facts. The said petition of appeal reads as follows:

(a) The learned trial judge was wrong in not considering the evidence of SP6, Jayaletchumy a/p Suppiah, the star witness of the prosecution, given in court under oath, which evidence was contradicted by the evidence of SP3, SP4 and SP5. Her evidence in court was further contradicted by exh P6, the first information report, and the medical report on her, exh P41.

(b) The learned trial judge was wrong in not considering the evidence of SP6, which was not supported by any prosecution witness nor any document tendered by the prosecution in support of her evidence.

(c) The learned trial judge was wrong in not considering the two versions given by SP6 which were contradictory; the first that there was a robbery and the deceased was injured as a result of what transpired in the robbery. This was supported by the evidence of SP3, SP4 and SP5 and documents exhs P6 and P41 and the second that the appellant caused the death of the deceased.

(d) The learned trial judge was wrong in not considering that there were two versions in the prosecution case; this being the position, the learned trial judge ought to have held where the prosecution leads two sets of evidence each of which contradicts and strikes at the other and shows it to be unreliable, the court would be left with no reliable and trustworthy evidence upon which a conviction of the accused could be based.

(e) The learned trial judge was wrong in not concluding SP6's evidence given in court stood impeached by the other evidence led by the prosecution in the prosecution case.

(f) The learned trial judge seriously misdirected himself in concluding the prosecution had made out a prima facie case for the appellant's defence to be called.

(g) The learned trial judge was wrong in not concluding that the defence of intoxication under s 85(2) and s 86(2) of the Penal Code had been made out by the defence.

(h) The learned trial judge was wrong in not concluding the deceased had come by his death as a result of an accident thereby bringing the appellant's case within s 80 of the Penal Code.

(i) The learned trial judge was wrong in not concluding the defence had made out a case of private defence.

(j) The learned trial judge misdirected himself seriously when concluding:

> Having considered the defence of accident under s.80 and the defence of self defence under s 102 of the Penal Code vis-a-vis of the evidence of the prosecution, I found that the accused had failed to establish the two aforesaid defences on the ground that both the defence were in complete contradiction with the version given by SP6.
>
> The court had earlier evaluated the evidence of SP6 and found that she was a witness of truth and her version was corroborated by the medical evidence given by the forensic expert (SP8) that is her description of the attack of the deceased by the accused tallied with the injuries described by the forensic expert. On the other hand I found that the defence of accident and private defence ran contrary to the injuries sustained by the deceased.
>
> I found the nature of the injuries sustained by the accused and the opinion of the forensic expert that there was no sign of self defence from the injuries detected do not fit into the aforesaid defences raised by the accused.
>
> I also found that all the defences put forward by the accused namely intoxication, accident and self defence had also failed to create any reasonable doubt in the prosecution case.
>
> On the whole I found that the prosecution had proved its case beyond reasonable doubt in respect of the murder charge against the accused.'

[8] The learned counsel for the appellant before us, inter alia, limited his submission to credibility of SP6 evidence as well as corroboration. The learned counsel complains that SP6 evidence was not consistent and contradicts SP3, SP4, SP5 and the first information report ('P6') and the medical report in exh P45, and inconsequence says that SP6 evidence is unworthy of credit.

[9] On the factual matrix of the case the submission of the learned counsel cannot be sustained. The fact that the appellant has relied on the two defences in law affirms the actus reus of the offence. The nature of injury will clearly attract s 300 of the Penal Code, unless one or both defence succeed to escape sentence pursuant to s 302 of the Penal Code.

INTOXICATION

[10] The first rule is that intoxication per se or what we call as self induced intoxication is not a defence for a criminal charge. The threshold facts which need to be satisfied to entail the defence of intoxication are very high. (See *Kenneth Fook Mun Lee v Public Prosecutor* [2007] 2 MLJ 130; [2006] 4 CLJ 359; *Chan Kwee Fong v Public Prosecutor* [2010] 1 MLJ 441; [2010] 3 CLJ 671; *Balamurugan Nagaraju v Public Prosecutor* [2013] MLJU 275; [2013] 5 CLJ 308). The burden is on the accused to satisfy the requirement of s 85(2) before he will be entitled to mitigate the sentence as provided for in s 86. Sections 85 and 86 of the Penal Code read as follows:

> 85(1) Save as provided in this section and in section 86, *intoxication shall not constitute a defence to any criminal charge.* (emphasis added).
>
> (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and —
>
> (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
>
> (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
>
> 86 (1) Where the defence under subsection 85(2) is established, then in a case falling under paragraph (a) thereof the accused person shall be acquitted, and in a case falling under paragraph (b), section 84 of this Code, sections 347 and 348 of the Criminal Procedure Code [Act 593] shall apply.
>
> (2) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
>
> (3) For the purpose of this and the preceding section 'intoxication' shall be deemed to include a state produced by narcotics or drugs.

[11] It is essential to note that s 86 will only become applicable by reason of

intoxication caused against the appellant's will. Even in a case of involuntary drunkenness the appellant has to show that by reason of drunkenness he did not know (i) the nature of the act, or (ii) that it was wrong, or (iii) that it was contrary to law. (see *In re Macheria Balaswamy of Guntur* AIR 1953 Mad 827). Section 85 protection will also not be available on the plea that the friends or relatives persuaded him to drink more than he could digest, (see *Jethuram Sukhra Nagabanshi v State of Madhya Pradeh* AIR 1960 MP 242). In England, self-induced intoxication may be a good defence if it had rendered the accused incapable of forming the mens rea (see *Director of Public Prosecutions v Beard* [1920] AC 479). Under s 85 there is only a nominal window of opportunity as set out in s 85(2) for drunkards to escape the sentence of death for a charge of murder. The position in India is also the same.

[12] We have perused the appeal record several times to see whether there was sufficient evidence to sustain the defence of intoxication. We could not find any.

SELF DEFENCE

[13] Section 102 of the Penal Code states:

> 102 The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

[14] The threshold requirement to satisfy the defence of self defence is very high. The evidence in the instant case shows that the appellant had entered the premise of the victim and had a quarrel which led to fatal injury which caused the death of the victim. On such facts at least it must be shown that the victim was the assailant and there was no opportunity for the appellant to escape and/or if any attempt to escape would have been futile. It would have been different if the victim had entered the appellant's premise with arms and subsequently there was a quarrel and assault and in the moment of heat, injuries were caused which led to death and the conduct was not punitive in nature. In such circumstances the appellant need not show that he could have escaped from his own house. The facts of the case will show that it was the appellant who entered the victim's house and not otherwise. (see *Rozmi bin Yusof v Public Prosecutor* [2013] 5 MLJ 66).

[15] Further, the nature of injury will also not assist the appellant to rely on s 102. The right of private defence is available for protection against unlawful aggression and not for punishing the aggressor for the offence committed by him. Section 102 is said to be preventive and not punitive right (see *Nandi Criminal Law Referencer*, Vol 3, (3rd Ed), p 283).

[16] We have perused the appeal record and find it difficult to fathom how s 102 defence will be applicable on the facts of the case taking into consideration the conduct of the accused and nature of injury. We are of the considered view that the learned trial judge was correct in dismissing the defence of intoxication as well as self defence.

[17] We have stated earlier the learned counsel complaint relating to contradictions and corroboration has very little significance in murder cases more so when the actus reus is not in dispute inconsequence of the defence of intoxication and self defence.

[18] If the appellant's case is that he did not commit the offence then contradictions and corroboration becomes an issue. In addition in criminal case the accused cannot have one version at the prosecution stage to say that he did not commit the crime and another version in the defence case to admit the actus reus and rely on statutory defences, etc. That is to say you cannot have alternative defences one to negate actus reus and subsequently admit actus reus and say there is lack of mens rea for the offence. Alternative pleas will stand as an anathema for the defence in criminal cases and also has no foundation in criminal cases. The story must be consistent and credible to earn a lesser sentence or acquittal for a charge of murder, and alternative pleas does not assist.

[19] Even though the learned counsel did not submit on all the issues stated in the appeal record, we have taken the liberty to go through all of it and we find no merits.

[20] We have perused the evidence in detail and we are satisfied that there are sufficient material to support the charge and the court had followed *Radhi*'s direction and rightly applied the maximum evaluation and beyond reasonable doubt test, (see *Tong Kam Yew & Anor v Public Prosecutor* [2013] 4 MLJ 888; *Chin Kek Shen v Public Prosecutor* [2013] 5 MLJ 827).

[21] We are of the considered view it is a safe decision and appellate intervention is not warranted and the appeal has no merit. Accordingly we dismiss the appeal.

A We hereby order so.

Appeal dismissed.

B Reported by Afiq Mohamad Noor

C

D

E

F

G

H

I